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Before the  
Federal Communications Commission  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
Allocation of Spectrum Below ) ET Docket No. 94-32  
5 GHz Transferred from )  
Federal Government Use )

To: The Commission

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**REPLY COMMENTS OF  
IN-FLIGHT PHONE CORPORATION**

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### SUMMARY

There are two aspects to the Commission's most recent order in this docket. First, the order allocates spectrum to a new GWCS service. Second, it proposes a regulatory structure to govern licensing of companies desiring to provide GWCS service.

In-Flight submits the present reply comments in response to the second aspect of the Commission's order (proposing a regulatory structure to govern licensing of GWCS operations). The appropriate time to comment on the first aspect of the order (allocating spectrum to a new GWCS service) is in the context of petitions for reconsideration of that aspect of the Commission's order. These petitions are not yet due.

In its reply comments here, In-Flight urges the Commission to strengthen, not weaken as some commenters have urged, the proposed mandatory construction rules governing GWCS licensees. In addition, In-Flight urges the Commission not to grant initial GWCS licenses to serve any area smaller than an MTA notwithstanding the request of certain commenters that it do so. Finally, In-Flight urges the Commission to allow an applicant needing a nationwide GWCS license to identify the channel block(s) on which it will operate after its bid is confirmed as a winning bid, rather than requiring the applicant to apply for a nationwide license on a specific channel block(s).

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Today, people have access to numerous channels of live video and audio programming while at home, but the nearly 1.6 million people who fly each day on commercial aircraft in the continental United States have access to no live programming. In-Flight has spent more than \$5 million to develop technology necessary to provide a multi-channel live audio and video programming service for these people, and it believes it will be in a position to serve all of them within two years of the date it obtains a license from the Commission.

Regulations proposed by the Commission to govern licensing in the new GWCS service give In-Flight its first opportunity to apply for a license to provide the service it has developed, but it may be unable to do so if the agency includes in its final GWCS rules certain features recommended by commenters. Below, In-Flight responds to each of these objectionable proposals. In addition,

In-Flight asks that the Commission modify its proposed GWCS rules in certain respects.<sup>1/</sup>

#### DISCUSSION

I. The Commission Should Not Weaken the Construction Requirements It Has Proposed but Instead Should Strengthen These Requirements Substantially

Two commenters ask the FCC to weaken the mandatory construction deadline the agency has proposed for GWCS licensees. In its Notice, the Commission has proposed to require automatic forfeiture of a GWCS license if the licensee fails to provide signal coverage to 33 percent of the population within its licensed service area within five years of the license grant date.<sup>2/</sup>

The arguments of the two commenters who support a weaker construction deadline actually demonstrate the need for much stronger construction requirements. The Commission requires all types of FCC licensees to construct their licensed transmitters by a specified time in order to reduce speculation in FCC licenses. Yet the two commenters who favor relaxation of the proposed GWCS construction deadline justify their request with the argument that giving licensees more time to construct their transmitters would

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<sup>1/</sup> In-Flight believes the Commission's decision to allocate the 4660-4685 MHz band to GWCS is unlawful and is contrary to the public interest for reasons it has described earlier in this proceeding, but the present pleading recommends a regulatory structure to govern GWCS licensing rather than asking the Commission to revise its allocation decision. Petitions challenging the decision to allocate this band to GWCS are not yet due.

<sup>2/</sup> Notice at ¶ 124. Ten years after license grant, forfeiture of license would occur if the licensee fails to provide signal coverage to 67 percent of its licensed service area. The licensee is free never to serve the remaining 33 percent of the people within its service area.

provide a broader opportunity for speculators to obtain licenses. Thus, PCIA shamelessly asks for a weaker construction deadline on the ground that it is not "spectrally efficient or cost effective to require . . . [GWCS licensees] to build systems where they have no need for service."<sup>3/</sup> By definition, anyone who applies for a license to serve an area where there is no need for service is a license speculator. Similarly, Bell Atlantic asks the Commission to adopt a weaker construction deadline so licensees would have more time to develop ideas and technology for services that do not now exist.<sup>4/</sup> Yet a company which applies for a license to provide a service which it cannot define is a speculator.<sup>5/</sup>

Although the Commission has sought to justify a weak construction deadline for GWCS licensees by noting that its proposed GWCS construction deadline is similar to the deadline adopted for broadband PCS licensees,<sup>6/</sup> the comparison is misplaced. The Commission justified a weak construction deadline for broadband PCS licensees for two reasons, both of which are inapplicable here. First, the agency concluded that a lengthy construction deadline was necessary for broadband PCS licensees because the broadband PCS band is heavily occupied by private microwave users all of whom must be

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<sup>3/</sup> PCIA Comments at 5.

<sup>4/</sup> Bell Atlantic Comments at 6.

<sup>5/</sup> If Bell Atlantic intends to apply for a GWCS license, it apparently intends to do so as a speculator since it expressed no interest in providing any service on the GWCS band in the two earlier stages of this proceeding and even now offers no hint of the service it would provide.

<sup>6/</sup> Notice at ¶ 124.

moved to other frequencies before PCS service can begin. By contrast, the GWCS band is unoccupied. Second, the Commission found that a lengthy construction deadline was desirable for broadband PCS because the complex technology necessary to provide that service would not be commercially available for several years. By contrast, each communications service which companies have proposed to provide as a GWCS licensee already is well defined, and the equipment necessary to provide it almost certainly can be developed in far less time than five years. For example, In-Flight would provide live programming to airline passengers if it obtains a GWCS license, and the company anticipates providing nationwide coverage within two years of license grant. Similarly, television broadcasters have stated they would use GWCS spectrum for studio-to-transmitter links and other auxiliary broadcast purposes. Equipment to provide these services on the GWCS band will not require five years to produce since these services are provided today on other bands to support NTSC broadcasting and since broadcasters have stated that they would use GWCS licenses to provide identical services to support ATV broadcasting, which they say is "close to roll-out".<sup>2/</sup> Companies desiring a GWCS license to operate private communications networks also would not require a five year lead time to produce the necessary equipment since these services already are provided today on other bands. The same is true for MMDS return links. Transmitters providing return links for

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<sup>2/</sup> Joint Comments of AMST and Other Major TV Broadcasting Entities at 2 (March 21, 1995).

MMDS systems almost certainly can be derived from products already developed for provision of IVDS, a functionally identical service. And it should not require anything close to five years to produce this equipment.

In view of these facts, the Commission not only should resist weakening its proposed construction deadline, it also should significantly strengthen its proposed construction requirements in order to help reduce the number of license applications by speculators. In-Flight proposes that the Commission require that each GWCS licensee provide service to at least 70 percent of the population within its service area within three years of the license grant date and at least 85 percent of the population within five years of the grant date.<sup>8/</sup>

II. No Public Policy Would Be Served By Awarding Licenses to Serve Smaller Areas than the Commission Has Proposed

Some commenters urge the FCC to award licenses for small geographic service areas rather than for the larger Major Trading

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<sup>8/</sup> The Commission has inquired whether even the weak construction deadline it proposes is overly stringent when applied to a GWCS licensee providing the service that In-Flight proposes. See Notice at ¶ 124. In fact, for reasons explained above it is unnecessarily weak. A requirement that In-Flight provide nationwide signal coverage to 33 percent of the U.S. population within five years of the date its GWCS license is granted would be overly stringent only if the Commission measured compliance by determining the percentage of the nation's population whose houses are located within the service area of In-Flight's transmitters. But this would be irrational since the In-Flight service would serve people when they are on aircraft not when they are at home. As indicated above, In-Flight anticipates that it would be in a position to provide nationwide signal coverage within two years of the license grant date if signal coverage is measured from the aircraft where In-Flight's customers would be located.



Areas ("MTAs") the agency has proposed.<sup>9/</sup> They support their request with the assertion that without small service areas, GWCS licensees may never serve rural communities because each MTA contains at least one urban area and winning bidders will be those interested in serving urban areas within each MTA.<sup>10/</sup>

The Commission should not award licenses to serve a geographic area smaller than an MTA because the MTA licensing scheme proposed by the Commission has been designed to meet the objective that proponents of small service areas desire. In its Notice, the Commission has proposed to let each GWCS licensee partition its licensed service area and sell any parts it does not want to serve.<sup>11/</sup> If winning bidders consist of applicants interested primarily in serving metropolitan communities, these licensees will have an economic incentive to partition their service areas and sell the rural portions to those interested in serving rural communities.

It also would be inequitable to award GWCS licenses to serve smaller areas than MTAs. Those interested in providing mobile GWCS in rural areas have the option of applying not only for a GWCS MTA license but also may apply for a broadband or narrowband PCS license to serve any of the numerous small licensing areas established by the Commission for each of those services. By contrast, those interested in applying for a license to provide a

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<sup>9/</sup> Comments of Wireless Cable Association at 7-8; Comments of Leaco Telephone Cooperative at 10-11; Comments of American Telecasting at 3-4; and Comments of PCIA at 4.

<sup>10/</sup> Id.

<sup>11/</sup> Notice at ¶ 80.

new nationwide service have no option than to apply for a GWCS license.

Even if rural America would not receive GWCS service because of the relatively large service areas the FCC has proposed, the agency would not need to adopt smaller GWCS licensing areas to solve this problem. Instead, it could largely eliminate this problem by requiring GWCS licensees to construct transmitters more broadly and rapidly than the Commission has proposed. As stated above, the Commission has proposed to require each licensee to serve just 33 percent of the population within its licensed service area within five years of receiving a license. This would encourage applications from license speculators rather than from those interested in providing communications service. By contrast, requiring licensees to serve substantially more people more quickly would serve these commenters' objective without reducing the size of service areas.

III. Any Company Applying for a License To Provide an  
Inherently Nationwide Service Should Be Allowed to Select  
the Channel Block(s) on Which It Would Provide Service  
after the Commission Confirms that It Submitted a Winning  
Bid

While the Commission should neither weaken its proposed construction deadline nor reduce the size of service areas as some have recommended, it should make one important change in the bidding procedures it has proposed. Specifically, for the reason described below the Commission should permit any applicant requiring a nationwide license to submit its bid without specifying the channel block(s) on which service would be provided. For example,

an applicant requiring one channel block on a nationwide basis would submit its license bid for use of one channel block without identifying any particular block, and it would select the block on which to operate at the close of the auction if it submits a winning bid.

- A. Forcing an Applicant Who Requires a Nationwide License to Bid On a Specific Channel Block Would Make that Applicant Uniquely Vulnerable to a Competing Bid by One Whose Primary Motive Is to Keep the Applicant from Obtaining a License

The Commission has recognized the importance of designing an auction system that does not unfairly discriminate against those proposing to provide a service that is inherently nationwide in scope, and it has proposed to implement certain procedures to serve this objective. For example, it has proposed to award all GWCS licenses pursuant to a single, simultaneous auction.<sup>12/</sup> And it has proposed to let applicants submit a combinatorial bid for a license to serve multiple MTAs.<sup>13/</sup> Without these features, the Commission has recognized that a company desiring to provide nationwide service would have little incentive to apply for a GWCS license.

Although the Commission should open GWCS to applicants proposing nationwide service by adopting the auction procedures it has proposed, it also should permit any applicant requiring a nationwide license to bid for a license without specifying the channel block(s) on which service would be provided. Instead, this

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<sup>12/</sup> Id. at ¶¶ 87-88.

<sup>13/</sup> Id. at ¶¶ 89-92.

channel block(s) on which service would be provided. Instead, this applicant would select the channel block(s) on which to operate if it submits a winning bid. Under this approach, an applicant for a nationwide license to operate on a single channel block would be the winning bidder if its nationwide combinatorial bid was one of the top five bids when judged against the nationwide aggregated bids for each of the five GWCS channel blocks.<sup>14/</sup>

Unless an applicant proposing an inherently nationwide service is allowed to bid for a license without regard to the specific channel block(s) on which it would operate, this applicant will be uniquely vulnerable to a competing bid from someone whose primary motive is to block that applicant from obtaining a license. While all applicants theoretically could be subject to a competing bid by someone whose primary motive is to thwart the applicant from obtaining a license, this risk is substantially greater if the applicant requires nationwide use of the same channel block(s). In that circumstance, a competing bidder might be able to thwart the applicant from obtaining a license fairly easily. This is because the anticompetitive bidder might need only to bid on a single MTA license from the channel block(s) specified in the nationwide applicant's bid and then submit a bid for this single license in an

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<sup>14/</sup> No public policy would be served by requiring a party needing a nationwide license to bid on a specific channel block(s) since GWCS channel blocks are fungible. By contrast, the Commission has required license applicants for other services to bid on specific channel blocks because the blocks were not fungible. For example, channel blocks for some communication services are not fungible because they contain different amounts of bandwidth. Others are not fungible because they contain different numbers of incumbent users.

a nationwide license is less than the combined nationwide bid of those seeking regional (i.e., MTA) licenses to operate on the same block. The applicant for a nationwide license is substantially less vulnerable to such anticompetitive blocking action by a competitor if the applicant for nationwide license is allowed to select the channel block(s) on which it will operate after the Commission determines that it submitted a winning bid. In that circumstance, a bidder desiring to block the applicant from obtaining a license would have to submit bids for at least one MTA license on all channel blocks rather than submit a bid for one MTA license only on the block(s) covered by the nationwide applicant's application.

The Commission need not exempt an applicant for a nationwide license from the obligation to identify in its application the channel block(s) on which it will operate unless the applicant's proposed service is inherently nationwide in scope. This is because an applicant proposing to provide, on a nationwide basis, a service which is not inherently nationwide in scope would be less likely to draw a bid from someone whose primary motive is to block the applicant from obtaining a license since it still could provide service on a regional basis even if it does not obtain a nationwide license. Although it is conceivable that various types of communications service can be provided most efficiently on a nationwide basis, some services are inherently nationwide in scope since

they cannot be provided at all unless they are available nationwide.<sup>15/</sup>

B. Adopting This Proposal Would Reduce Any "Free Rider" Advantage the Commission Has Speculated Such Applicants Otherwise Might Have

Allowing an applicant requiring a nationwide license to make a generic channel block bid as described above also would reduce any theoretical "free rider" benefit that otherwise might accrue to an applicant for nationwide license under combinatorial bidding. In the Notice, the Commission has proposed to permit combinatorial bidding in order to make GWCS licenses available for provision of nationwide service even though it has speculated that this might unfairly favor combinatorial bidders in some cases. According to the Commission, combinatorial bidders could be at an advantage over MTA bidders if some MTA bidders proposing to operate on the same channel block failed to increase their bids to a fair market price on the expectation that bidders for other MTA licenses on the same channel block would increase their bids sufficiently to beat the combinatorial bid.<sup>16/</sup> Allowing an applicant needing a nationwide license to submit its combinatorial bid without regard to a specific channel block would substantially dilute any theoretical

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<sup>15/</sup> The service In-Flight proposes is one example. The Commission already has recognized that a communications service aimed at commercial airline passengers is inherently nationwide in scope since no major airline will allow the service to be provided on its aircraft unless it is available on all airline routes. See, e.g., Allocation of the 849-851/894-896 MHz Bands, 5 FCC Rcd. 3861, 3869 (1990) ("the air-ground service is inherently nationwide in scope as many airlines today serve large portions of the United States").

<sup>16/</sup> Notice at ¶ 91.

advantage that applicant otherwise might have from the "free rider" syndrome since those bidding for MTA licenses would not know on which channel block(s) the combinatorial bidder would operate if it submits a winning bid.

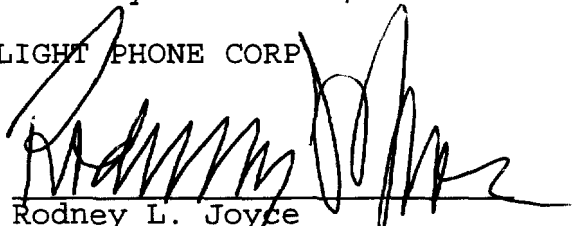
CONCLUSION

The Commission should strengthen, not weaken, its mandatory construction rules, and it should not grant initial licenses to serve any area smaller than an MTA. The Commission also should allow an applicant needing a nationwide license to identify the channel block(s) on which it will operate after its bid is confirmed as a winning bid.

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Dated: April 4, 1995

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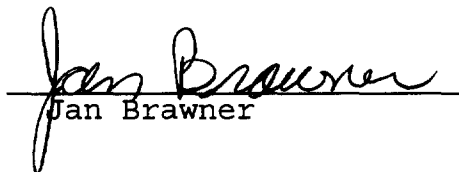
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